

DEC 19 1978

MICHAEL SENDAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-887

COLONIAL BANK & TRUST COMPANY,

Petitioner,

vs.

DEPARTMENT OF FINANCIAL INSTITUTIONS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

THEODORE L. SENDAK
Attorney General of Indiana

DONALD P. BOGARD
Chief Counsel

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-6249

Attorney for Respondent

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Comes now the Department of Financial Institutions of the State of Indiana (hereafter Department), by Theodore L. Sendak, Attorney General of Indiana and Donald P. Bogard, Chief Counsel, and pursuant to Rule 24 of the Rules of this Court, submits its "Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Indiana."

OPINION BELOW

The opinion that Petitioner, Colonial Bank & Trust Company (hereafter Colonial), seeks to have this Court review

was issued by the Indiana Court of Appeals on May 11, 1978, styled as *Department of Financial Institutions vs. Colonial Bank & Trust Company*, 375 N.E. 2d 288 (Ind. App., 1978), See Petition Appendix (hereafter Pet. App.) p. 33. Colonial's Petition for Rehearing by the Indiana Court of Appeals was denied on August 10, 1978. Pet. App. 41. No Petition to Transfer to the Supreme Court of Indiana was filed by Colonial.

JURISDICTION

Colonial alleges jurisdiction in this Court pursuant to 28 U.S.C. § 1257. The Department would submit that such jurisdiction is totally lacking since Colonial does not seek review of a decision of the highest court in Indiana which could render a decision in this matter as required by 28 U.S.C. § 1257. In addition, the Petition is not timely pursuant to 28 U.S.C. § 2101(c) in that the decision sought to be reviewed was issued more than ninety (90) days prior to the filing of the Petition and no petition for extension of time was filed by Colonial.

QUESTION PRESENTED FOR REVIEW

Whether this Court has jurisdiction to review the Petition for Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257 provides, in part, as follows:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

28 U.S.C. § 2101(c) provides:

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

STATEMENT OF THE CASE

The Department accepts the Statement of the Case contained in the Petition.

REASONS FOR DISALLOWANCE OF THE WRIT

I.

The Decision sought to be reviewed is not from the highest court of the State

Colonial seeks to have this Court review a decision of the Indiana Court of Appeals, an intermediate appellate court, and alleges jurisdiction in this Court pursuant to 28 U.S.C. § 1257. That statute provides for review by this Court of final judgments ". . . rendered by the highest court of a State in which a decision could be had . . ."

Rule AP. 11 of the Indiana Rules of Appellate Procedure provides, in part, as follows:

(A) Rehearings. Application for a rehearing of any cause may be made by petition, separate from the briefs, signed by counsel, and filed with the clerk within twenty [20] days from rendition of the decision, stating concisely the reasons why the decision is thought to be erroneous. Such application may, if desired, be supported by briefs, but such briefs will not be received after the time allowed for filing the petition. Parties opposing the rehearing may file briefs within ten [10] days after the filing of the petition. No extension of time shall be granted for the filing of a petition for rehearing or any brief in connection therewith.

(B) Transfers. In every case where a petition for rehearing has been filed in the Court of Appeals and denied, *the party against whom the decision is rendered shall have a right to petition the Supreme Court* within twenty [20] days from the day of the ruling on the petition for rehearing and [to] transfer said cause to the Supreme Court for review; Provided, however, That the petition to transfer shall be limited to only those grounds set forth in the petition for rehearing in the Court of Appeals. . . .

(3) The opinion or memorandum decision of the Court of Appeals shall be final except where a petition to transfer has been granted by the Supreme Court. If transfer be granted, the judgment and opinion or memorandum decision of the Court of Appeals shall thereupon be vacated and held for naught, and the Supreme Court shall have jurisdiction of the appeal as if originally filed therein, and all the records, briefs and files of said cause on appeal shall be transferred to the Supreme Court.

(4) The denial of a petition to transfer shall have no legal effect other than to terminate the litigation between the parties in the Supreme Court. (Emphasis Supplied).

Colonial candidly admits on pages 1 and 2 of its Petition that the decision sought to be reviewed is from the Indiana Court of Appeals, even though the caption of the Petition requests a writ to the Supreme Court of Indiana, and further admits that no "Petition to Review" was filed in the Supreme Court of Indiana. Since AP. 11(B) grants every party suffering an adverse decision in the Court of Appeals the *right* to petition the Supreme Court of Indiana for review, there is, therefore, no final judgment rendered in this cause "by the highest Court" of Indiana "in which a decision could be had." Thus, there is no jurisdiction pursuant to 28 U.S.C. § 1257. *Stratton v. Stratton*, 239 U.S. 55 (1915).

II.

The review sought is not timely

Even if the decision of the Indiana Court of Appeals was somehow reviewable by this Court (and Colonial has not shown any right to review under Rule 19 of the Rules of this Court), the Petition was not timely filed. The Court of Appeals decision was entered on May 11, 1978, Pet. p. 2, and the Petition for Rehearing was denied on August 10, 1978. Pet. App. p. 41. Pursuant to 28 U.S.C. § 2101(c), the Petition should have been filed in this Court by November 8, 1978, unless the time was extended. No petition for extension of time was filed, and the Petition for Writ of Certiorari was not filed until December 4, 1978. Therefore, the filing is not timely and the Writ should be denied.

CONCLUSION

For all the above and foregoing, the Department of Financial Institutions would urge this Court to disallow the Writ prayed for herein.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

DONALD P. BOGARD
Chief Counsel

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-6249
Attorney for Respondent